83-1114

Office - Supreme Court, U.S.
FILED
JAN 6 1984
ALEXANDER L. STEVAS,
CLERK

No. _____

In The
Supreme Court of the United States

OCTOBER TERM: 1983

G. Harold KING, Jr., Appellant
Petitioner

v.

FIDELITY NATIONAL BANK OF BATON ROUGE,
Appellee
Defendant

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Petition of
G. HAROLD KING, JR.
Petitioner-Appellant,
for a Writ of Certiorari

Respectfully submitted
BY ATTORNEY
FRANZ JOSEPH BADDOCK
P.O. Box 3573
Baton Rouge, Louisiana
70821
(Tel.: (504) 343-9194)

THE QUESTIONS PRESENTED FOR REVIEW

(1) Under the Constitution and laws of the United States, as particularized in *Marathon*, ante, and the Emergency Resolution developed by the Judicial Conference of the United States, can a NON-Article III entity DENY rights of Jury Trial, or any trial, to an individual against whom an involuntary petition in bankruptcy has been filed, under Sec. 303 of the Bankruptcy Code (11 U.S.C. 303)?

(2) When a United States Court of Appeals decrees that an involuntary petition under 11 U.S.C. 303 should NOT have been filed against a spouse simply because she was married to an alleged bankrupt, and orders her DISMISSED from said proceeding, is it proper for the Court, at the same time, to condone her being subject to a RULE 205 RBP examination without an Order of Court authorizing same, as required by said Rule?

TABLE OF CONTENTS

Page

THE QUESTIONS PRESENTED FOR REVIEW ... i

TABLE OF AUTHORITIES iii

A CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED 1

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED - BASIS FOR FEDERAL JURISDICTION 2

A CONCISE STATEMENT OF THE CASE 3

A DIRECT AND CONCISE ARGUMENT 4

CONCLUSION AND PRAYER 12

CERTIFICATE OF SERVICE 14

APPENDIX ..... (separately presented under Rule 21(k))

TABLE OF AUTHORITIES

Northern Pipeline Const. Co. v. Marathon Pipe Line Co., ("Marathon"), 102 S. Ct. 2858, 6 C.B.C. 2d 785 (1982)

Dairy Queen v. Wood (1962) 369 U.S. 469, 82 S.Ct. 894, 8 L Ed2d 44

Beacon Theatres Inc. v. Westover (1959) 359 U.S. 500, 79 S.Ct. 948, 3 L. Ed2d 988

Harrison v. Chamberlin (1926) 271 U.S. 191, 194-195, 46 S.Ct. 467, 70 L. Ed. 897

Sartor v. Arkansas Natural Gas Corp. (1944) 321 U.S. 620, 64 S.Ct. 724, 88 L. Ed. 967

Pan-American Life Insurance Co. v. Menendez Rodrigues et al (1964) 376 U.S. 779, 84 S.Ct. 1130

Aetna Insurance Co. v. Menendez (1964) 376 U.S. 781, 84 S.Ct. 1131

Standard Cigar Co. v. Tabacalera Sereriano Jorge, S.A. ((1964) 376 U.S. 780, 84 S. Ct. 1131

First Houston Investment Corp. et al v. Wilson (1979) 444 U.S. 959, 100 S.Ct. 442, 621 L. Ed2d 371

Bush v. Lucas (1980) 446 U.S. 914, 100 S.Ct. 1846, 64 L. Ed2d 268

Miller v. Castlewood International Corp. (1980) 446 U.S. 949, 100 S.Ct. 2914, 64 L. Ed2d 806

Monolith (Ca 9th 1957) 240 F.2d 444, 445

Tights, Inc. v. Stanley (CA 4th 1971) 441 F.2d 336, 337

Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 12 Bank. Reptr 946

Powell v. City of Key West Florida (CA 5th 1970) 434 F.2d 1075

Harvey v. Great Atlantic and Pacific Tea Co. (CA 5th 1968) 388 F.2d 123

Cameron v. Vancouver Plywood Corp. (CA 9th 1959) 266 F.2d 535, 540

Article III Sec 1 of the United States Constitution
Amendment VII to the United States Constitution

11 U.S.C. 303
11 U.S.C. 501
11 U.S.C. 727(c)(1)
Sec. 241(a) of Public Law 95-598
28 U.S.C. 1480(b)
28 U.S.C. 1471(a) and (b)
28 U.S.C. 2101(c)
5 U.S.C.A. 552 subsections (a)(4)(B) and (a)(4)(F)
Rule 205(a) of the Rules of Bankruptcy Procedure
Rule 45(d)(1) of the Federal Rules of Civil Procedure
Rule 56(c)FRCP/Rule 756(c) RBP
Rule 35(a) of the Federal Rules of Civil Procedure
RULE 17.1.(a) of the United States Supreme Court
RULE 20 subsections .2. and .4. of the United States Supreme Court
COLLIER ON BANKRUPTCY, 14th Ed. V 12 pages 2-75/2-98
Moore's Federal Practice V. 5A Par. 45.05(2) page 45-37 Par. 45.03 page 45-16

Commentaries on the Laws of England by SIR WILLIAM BLACKSTONE Fourth Edition by *James DeWitt Andrew* Calaghan and Company (1899)

A CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF TH'S COURT IS INVOKED

I

In addition to the grounds specified in the last part of Rule 17.1.(a), jurisdiction is invoked for the primary reason of affording opportunity for this Court to speak on the right of JURY TRIAL under 11 U.S.C. 303 and other provisions of the Bankruptcy Code—a topic on which there is a paucity of clarification, and much confusion.

Here is a man, G. Harold King, Jr., who served his country with distinction and honor in the United States Navy during World War II, and who was formerly Chairman of the Board of the Federal Reserve Bank in New Orleans, Louisiana, and later an Eisenhower Appointee to the Federal Reserve Board in Washington, D.C. (fifth item in Appendix). Yet this same individual is denied rights even common criminals receive! He is not only denied JURY TRIAL, but any trial, where material issues of fact are unresolved.

II

The particular reason for invoking jurisdiction is, if this Court desires additional justification of its decision in Marathon, supra, it can be found in the brutal facts of this case. Let the Supreme Court not search for a more appropriate illustration—it can not be found!

To some, the term "ART. III Court'" may be only a term of abstraction. But to Shirley G. King, it means salvation from the horror and torment inflicted on her and her minor children by a NON-Article III court, for, indeed it was an ART. III Court, the United States Court of Appeals for the Fifth Circuit, that released her!

III

Another important reason is to afford an additional opportunity for this Court to declare guidelines for the

United States Congress that seems to be having considerable difficulty in enacting remedies under the Bankruptcy Code mandated by Marathon, supra.

To the extent that any declarations by this Court may assist Congress in preventing future brutal injustices, such as occurred in entrusting such drastic power to NON-Article III Tribunals, this petition will have served a most worthy purpose.

IV

A fourth reason is to afford the Supreme Court opportunity to change an absurd interpretation given to its Rule 205(a) of the Rules of Bankruptcy Procedure, by the United States Court of Appeals for the Fifth Circuit.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED AND THE BASIS FOR FEDERAL JURISDICTION

This case involves Article III Sec. I of the Constitution of the United States, as well as the Amendment VII thereto.

The primary statute involved is 11 U.S.C. 303.

Other statutes involved are 11 U.S.C. 501 and 11 U.S.C. 727(c)(1).

To the extent that Marathon, supra, has invalidated Sec. 241.(a) of Public Law 95-598, it would appear that 28 U.S.C. 1480(b) has been declared unconstitutional, and this is the basis on which Petitioner proceeds. Quaere as to whether 28 U.S.C. 1471 is applicable to jurisdiction. (See: Emergency Resolution Rule developed by the Judicial Conference of the United States premised on the assumption that Marathon, supra, has not invalidated 28 U.S.C. 1471(a) and (b).

Reliance is had on 28 U.S.C. 2101(c) and Rule 20 sub-sections .2. and .4. of this Court as the basis for Federal Jurisdiction.

A CONCISE STATEMENT OF THE CASE

On July 24, 1981, the Fidelity National Bank of Baton Rouge filed a joint involuntary chapter 7 petition against G. Harold King, Jr. and Shirley G. King, under 11 U.S.C. 303. (first item in Appendix)

After the Kings filed a motion for a more definite statement, and motions to dismiss for failure to state a claim on which relief could be granted and lack of personal jurisdiction, the bank sought to examine the Kings under Rule 205 RBP and procured subpoenas without an order of court authorizing same.

On September 11, 1981 the Kings filed their ANSWER to the involuntary petition (second item in Appendix) with their request and prayer for Trial by Jury.

In the interim, the bank had subpoenas served on the Kings to compel their appearance for the examination. The day before the scheduled examination, the Kings filed a motion "to set aside" the notice and subpoena. On the advice of counsel, they did not attend the examination.

At all times pertinent, the court had ruled neither on the inital motions nor the motion to vacate, filed by the Kings. The bank moved for sanctions, and, after a hearing, the court fined the King's attorney $250.00!

On a motion for summary judgment filed by the bank, the court ignored the verified ANSWER of the Kings, disallowed trial by jury, disallowed ANY trial of the issues raised by the Kings in their ANSWER, and awarded summary judgment of an order for relief.

The Kings appealed to the District Court, then to the United States Court of Appeals for the Fifth Circuit. That Court (third item in Appendix) affirmed the judgment of the District Court other than its affirmance of the bankruptcy court's entry of the order for relief against Shirley King, in saying:

> "...we vacate the affirmance of that order and remand with instructions to direct the bankruptcy court to

vacate the order for relief against Shirley King and dismiss the petition against her."

Applications for rehearing by the Fidelity National Bank et al were denied October 11, 1983. (fourth item in Appendix) This Petition for Certiorari followed!

A DIRECT AND CONCISE ARGUMENT

11 U.S.C. 303(b)(1) provides:

"(b) An involuntary case is commenced by the filing...of a petition under chapter 7...

(1) by three or more entities, each of which is...a holder of a claim AGAINST SUCH PERSON that is not contingent as to liability...if such claims aggregate at least $5,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;" (Caps ours).

Unless the test of 303(b)(1) is met, there is no basis for invoking involuntary jurisdicition.

The Fifth Circuit (712 F.2d 188, 192) said that there was "absolutely no evidence of bad faith" on the part of the intervenors constituting two of the entities. But WHERE were we afforded opportunity to show otherwise in the employment of summary judgment (FRCP 56(c)/RBP 756(c)) that there were NO genuine issues as to any material facts?

Additionally, where the Court says (on the same page); "The lower courts clearly thought that summary judgment was warranted or they would not have granted it."———

is this not true of every case wherein summary judgment is granted? Hereafter, can Jury Trial be aborted in every case wherein lower courts hold such belief?

Does this not also conflict with the finding (page 190) "Shirley King was joined in the petition merely because she was Harold King's wife and HIS obligations were presumptively those of the marital community." (Caps

and und'scr ours)?

Obviously, such finding shows that the bank did not have a claim "against such person" of Shirley G. King within the requirement of 303(b)(1)!

Neither did the bank have claims against the person of G. Harold King, Jr., according to the verified allegations of his ANSWER to the involuntary petition! These disclose:

1 - A tie-in between the bank, King Lumber Industries, Inc., and I.H. Rubenstein, Inc.—more fully amplified in the Answer, which damaged the interests of Petitioner.

2 - That one of the properties covered under the bank's mortgage constituted the home occupied by King's father—a fact well within the knowledge of the bank.

3 - That because of this, G. Harold King, Jr. was at all times pertinent at the mercy of the bank, in that NOT to abide by its wishes might have endangered foreclosure, with the knowledge that such could possibly kill the father.

4 - That the bank knew that the sole and only reason whereby G. Harold King, Jr. affixed his signature to the notes of King Lumber Industries, Inc., was on account of concern for his father.

5 - That the father died in August of 1981!

6 - That prior to the execution of the bank's mortgage (March 6, 1980), Petitioner had NEVER endorsed obligations of King Lumber Industries, Inc. to the Fidelity National Bank.

7 - That said mortgage became a weapon of intimidation and harassment.

8 - That there were serious questions whether his signatures on corporate notes constituted his personal endorsement in law, and that in particular reference thereto, 1) at no time was he requested to obligate the legal community, 2) nor did he have the intention of doing so.

In specific reference to the involuntary petition, he DENIED that he was indebted unto the Fidelity National Bank in the amount alleged, DENIED that the Fidelity

National Bank held unsecured claims for the sum of $64,000.00, and DENIED that any claims of the Fidelity exceeded the value of any lien by $5,000.00.

In addition to praying for Trial by Jury before a United States District Court and United States District Judge, he specifically prayed for a jury determination on whether the Fidelity National Bank

a) properly evaluated its security, so as to allege itself an unsecured creditor—

b) was in fact the holder of unsecured claims in the amount of $64,000.00—

c) was in fact the holder of any unsecured claim of at least $5,000.00 more than the value of any lien—

d) filed its petition in good or bad faith—and—

IN ADDITION, HE PRAYED FOR A SPECIAL FINDING WHETHER HE WAS UNDULY PRESSURED BY THE BANK IN THE PLACEMENT OF HIS SIGNATURES ON DOCUMENTS.

In this entire record, there is not a single finding on any of these issues, all of which go to the jurisdictional issue of whether the Fidelity National Bank had grounds to invoke 11 U.S.C. 303!

In *Marathon*, supra, this Court held that the broad grant of jurisdiction to the bankruptcy courts under the Bankruptcy Reform Act of 1978 was unconstitutional because the bankruptcy courts are not Article III courts.

The Judicial Conference of the United States developed, as an emergency interim measure, a rule for adoption by the district courts—all of which districts have adopted the identical or similar measure.

Insofar as pertinent here, under the emergency rule the bankruptcy judges may perform all acts and duties necessary "except that the bankruptcy judges may not conduct" JURY TRIALS! Those matters which may not be performed by the bankruptcy judge shall be transferred to a

district judge!

The cherished right of Jury Trial has been reinforced by many decisions under the laws and Constitution of the United States.

In Monolith (CA 9th 1957) 240 F.2d 444, 445, the Court said:

> "Attorneys often give high rhetorical praise to the function of a jury under the common law system—and then, when it suits their clients' purposes, in order to defeat an adversary's demand for a jury trial they invoke "Governmental immunity", "lack of statutory right", " Inappropriateness" etc.
>
> "In the instant case, we do not propose to lend ourselves to any such ambivaluation of that potent instrument of Anglo-American law." (und'scr ours)

The cases best illustrating the absolute right to Jury Trial are: DAIRY QUEEN v. WOOD (1962) 369 U.S. 469, 82 S.Ct. 894, 8 L. Ed2d 44, and BEACON THEATRES INC. v. WESTOVER (1959) 359 U.S. 500, 79 S.Ct. 948, 3 L. Ed2d 988. In referring to these decisions, Tights, Inc. v. Stanley (CA 4th 1971) 441 F.2d 336, 337, says:

> "The Supreme Court has maintained a careful vigilance to assure this right (of jury trial) against erosion..." (() ours)

However, the strongest language supporting this right through implication, can be found in Marathon, supra:

> "Appellants cite...language to support their proposition that a bankruptcy court...power is constitutional, because the law of bankruptcy is a "specialized area," and Congress has found a "particularized need" that warrants "distinctive treatment."...
>
> "The flaw in appellants' analysis is that is provides no limiting principle.
>
> * * * * *
>
> "On appellants' reasoning Congress could provide for

the adjudication of these and "related" matters by judges and courts within Congress' exclusive control." The potential for encroachment upon powers reserved to the Judicial Branch...is dramatically evidenced in the jurisdiction granted to the courts created by the Act before us.

* * * * *

In short, to accept appellants' reasoning would require that we replace the principles delineated in our precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantees of an independent Judicial Branch of the Federal Government." (und'scr ours)

In this connection, the words of the Hon. MILES W. LORD, the United States District Judge that wrote the Marathon decision in the district court (12 Bank.Reptr. 946), have special meaning.

"The affairs of insolvent men are no less diverse than the affairs of men of more substantial means. INDEED NO CLASS OF INDIVIDUALS NEEDS THE PROTECTION OF AN INDEPENDENT JUDICIARY MORE THAN THE BANKRUPT." (Caps ours for emphasis)

We respectfully submit that the rights of G. Harold King, Jr. were effectively eviscerated by denial of Jury Trial (or any trial) under the guise of summary judgment. Indeed, one may ask, if a bankruptcy judge cannot conduct a JURY TRIAL under the emergency rule, by what right does he DENY such right?

Certainly NOT from the overwhelming jurisprudence dealing with summary judgement!

In HARRISON v. CHAMBERLIN (1926) 271 U.S. 191, 194-195, 46 S.Ct. 467, 70 L. Ed. 897, the Supreme Court said:

"...we are of opinion that when the claimant's

contention 'discloses a contested matter of right, involving some fair doubt and reasonable room for controversy,'...in matters either of fact or law, (it) is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color or merit, and a mere pretense." (Und'scr and () ours)

This, we submit, is landmark language reiterated, in substance, in a line of cases, including Powell v. City of Key West Florida (CA 5th 1970) 434 F.2d 1075, Harvey v. Great Atlantic and Pacific Tea Co. (CA 5th 1968) 388 F.2d 123, SARTOR v. ARKANSAS NATURAL GAS CORP. (1944) 321 U.S. 620, 64 S.Ct. 724, 88 L. Ed. 967, and Cameron v. Vancouver Plywood Corp. (CA 9th 1959) 266 F.2d 535, 540, wherein the Court said:

"All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment...It is especially necessary to be cautious in making such a determination where, as here, a jury trial has been demanded."

The history of RULE 205 RBP is covered in COLLIER ON BANKRUPTCY, 14th Ed. V. 12 pages 2-75/2-98. It was based primarily upon Sections 7a(10) and 21 a of the Bankruptcy Act. Sec. 7a(10) envisioned examination before the referee or judge of the bankruptcy court. Sec. 21a envisioned examination at a place other than the bankruptcy court, but before a judge of a state court.

Unfortunately, when RULE 205 was promulgated, it omitted the requirements stated. Indeed, by its literal language, there is no requirement that said examination be conducted before anyone authorized to administer oaths! THERE IS NO REQUIREMENT THAT THE

EXAMINATION BE REDUCED TO WRITING AND FILED IN THE RECORD! And, under its liberal terms, an entity can be ordered to Tiger Stadium for examination!

One thing is certain, however, and that is Rule 205 requires an ORDER OF COURT for its issuance. This is clear from sub (a) of said Rule which provides:

> "...the court may order the examination of any person." (und'scr ours)

The language of RULE 205 is similar to that found in RULE 35 FRCP, sub (a)

> "...the court...may order the party to submit to a physical or mental examination..."

and to the language found in 5 U.S.C.A. 552 (the Freedom of Information Act) in sub-sections (a)(4)(B) and (a)(4)(F):

> "...the district court...has jurisdiction...to order the production of any agency records..."
>
> "Whenever the court orders the production of any agency records..."

U.S.V. Portland Cement Co., supra, and Pioche, cited by the Fifth Circuit on page 191 of its decision, are not controlling here since both dealt with deposition procedure only and NEITHER was dependent upon an "Order of Court" for validity.

We followed exactly the procedure specified in RULE 45(d)(1) FRCP and the directive from Moore's Federal Practice V. 5A Par. 45.05(2) at page 45-37:

> "Where the service is improper...the person to whom the subpoena is directed may ignore it and present the defense of want of jurisdiction of his person at a subsequent proceeding." (und'scr ours)

To have done otherwise would have dignified a most flagrant usurping of authority vested only in the bankruptcy court! For this serious infraction, the bank escapes without an iota of condemnation, while the Attorney who tried to protect the integrity of the same court, is penalized!

Out purpose is raising this issue is not to stress technicalities, but rather to demonstrate brutal injustice! The Fifth Circuit referred to Shirley G. King's inclusion (Page 190) as a situation "that is not dealt with in the rules simply because IT OUGHT NEVER TO ARISE (Caps ours)"

Yet this same woman was ordered to appear at the office of the bank's attorney and undergo unrestricted examination WITHOUT AN ORDER OF COURT! This was done by the bank ignoring any "order of court" and obtaining a subpoena under RULE 45(a) FRCP which employs the mandatory language "shall be issued" and issued "in blank." In the view of Moore's Federal Practice V. 5A Par. 45.03 at page 45-16:

> "The clerk MUST issue any subpoena in blank, UPON REQUEST OF A PARTY..." (Caps ours)

Our prime reasons for the writ invlove the denial of Jury Trial! Speaking of Trial by Jury, SIR WILLIAM BLACKSTONE commented:

> "...the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law...it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affectd either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals. A constitution, that I may venture to affirm has, under providence, secured the just liberties of this nation for a long succession of ages." Fourth Edition Vol. II Ch. 23 Page 1139

Again referring to the fifth item in the Appendix, if such "transcendent privilege" of Jury Trial (or any trial) can be destroyed in relation to Petitioner, who has immunity from such destruction? If such desecration is condoned in the field of bankruptcy, what field of law is exempt?

This is not the only destruction involved here.

When the Fifth Circuit says (Page 192) that:

> "...had the intervenors chosen not to participate in the bankruptcy proceedings, King would have been able to plead a discharge received in these proceedings...",

might we inquire what happened to 11 U.S.C. 501 allowing a creditor to file proof of claim without being an intervenor, and to 11 U.S.C. 727(c)(1) wherein the trustee or a creditor may object to discharge without intervenor status?

When the Fifth Circuit says (Page 189 Note 3):

> "The Kings included a variety of other questions in their notices of appeal to this court, but these questions were not addressed in their briefs and are thus waived.",

it is to be regretted that the Fifth Circuit did NOT point out that SIX (6) APPEALS were consolidated into ONE (1) APPEAL, and under the size limitations on briefs under the Rules of the Fifth Circuit, we were forced to abandon issues.

If cherished rights are to be destroyed, the United States Supreme Court, as the final safeguard on liberties, should be afforded right of final decision on such matters.

CONCLUSION AND PRAYER

We respectfully submit for the reasons advanced herein that This Court should issue a Writ of Certiorari and summarily VACATE the Order for Relief (or adjudication in bankruptcy) entered against G. HAROLD KING, JR., and direct the United States Court of Appeals for the Fifth Circuit to order (1) Either a Trial by Jury before the United States District Court for the Middle District of Louisiana, of the issues and defenses raised by the said G. HAROLD KING, JR. in his Answer to the Involuntary Petition, or (2) A Dismissal of the Involuntary Petition.

We pray that this summary relief be afforded under the rules announced by This Court in:

PAN-AMERICAN LIFE INSURANCE CO. v.

MENENDEZ RODRIGUES et al (1964) 376 U.S. 779, 84 S.Ct. 1130

AETNA INSURANCE CO. v. MENENDEZ (1964) 376 U.S. 781, 84 S.Ct. 1131

STANDARD CIGAR CO. v. TABACALERA SERERIANO JORGE, S.A. (1964) 376 U.S. 780, 84 S.Ct. 1131

FIRST HOUSTON INVESTMENT CORP. et al v. WILSON (1979) 444 U.S. 959, 100 S.Ct. 442, 621 L. Ed2d 371

BUSH v. LUCAS (1980) 446 U.S. 914, 100 S.Ct. 1846, 64 L. Ed2d 268

MILLER v. CASTLEWOOD INTERNATIONAL CORP. (1980) 446 U.S. 949, 100 S.Ct. 2914, 64 L. ed2d 806

We further pray for all other relief necessary.
Respectfully submitted

BY ATTORNEY

/s/ Franz Joseph Baddock

FRANZ JOSESPH BADDOCK
P.O. Box 3573
Baton Rouge, Louisiana 70821
((504) 343-9194)

CERTIFICATE OF SERVICE

I certify under Rule 28.5, that I have this date, by prepaid mail, forwarded three (3) copies of the foregoing Petition for Certiorari to MR. DAVID S. RUBIN, Attorney, P.O. Box 2997, Baton Rouge, Louisiana 70821, who is counsel for the FIDELITY NATIONAL BANK OF BATON ROUGE.

I further certify (in accordance with 712 F.2d 188, 189 Note 2), that since neither Capital Investments, Inc. nor Louisiana Equity Capital Corp. filed any brief or otherwise appeared in the appeal before the United States Court of Appeals for the Fifth Circuit, that no service was necessary on these entities under Rule 28.5, and that all parties required to be served have been served under the said Rule 28.5.

Nevertheless, to apprise all entities that may have interest in this matter, I further certify that I have served an information copy of the same petition on Mr. FREDERICK R. TULLEY, Attorney, P.O. Box 2471, Baton Rouge, Louisiana 70821, Mr. CHARLES N. MALONE, Attorney, P.O. Box 3233, Baton Rouge, Louisiana 70821, and Mr. MICHAEL T. PERRY, Attorney, 5420 Corporate Blvd., Suite 302, Baton Rouge, Louisiana 70808.

BATON ROUGE, Louisiana, this January 5th, 1984.

/s/ FRANZ JOSEPH BADDOCK

Office - Supreme Court, U.S
FILED
JAN 6 1984
ALEXANDER L. STEVAS,
CLERK

83-1114

No.

In The
Supreme Court of the United States

OCTOBER TERM: 1983

G. Harold KING, Jr. Appellant
Petitioner

v.

FIDELITY NATIONAL BANK OF BATON ROUGE,
Appellee
Defendant

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

APPENDIX OF
G. HAROLD KING, Jr.

Respectfully submitted
BY ATTORNEY
FRANZ JOSEPH BADDOCK
P.O. Box 3573
Baton Rouge, Louisiana
70821
(Tel.: (504) 343-9194)

INDEX TO THIS APPENDIX SEPARATELY PRESENTED UNDER RULE 21(k)

List of Documents *Page*

INVOLUNTARY PETITION UNDER CHAPTER 7 1

ANSWER AND REQUEST FOR JURY TRIAL 15

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN No. 82-3379 19

DENIAL OF REHEARING 31

CAPTION SHEET ON HEARINGS BEFORE UNITED STATES SENATE COMMITTEE ON GEORGE H. KING, JR., et al 32

CERTIFICATE OF SERVICE OF APPENDIX 33

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA

IN RE.....CASE NUMBER 81-00329

G. HAROLD KING, JR. AND
SHIRLEY G. KING

INVOLUNTARY PETITION UNDER CHAPTER 7

1. Petitioner Fidelity National Bank of Baton Rouge is a creditor of G. Harold King, Jr., and Shirley G. King (sometimes hereinafter referred to as "Debtors"), and is the holder of claims against G. Harold King, Jr., and Shirley G. King that is not contingent as to liability, which claim exceeds $5,000.00 more than the value of any lien on the property of the Debtors securing claims held by petitioner.

2. The nature and amount of petitioner's claim is as follows: It is the holder of claims against the Debtors for the sum of $64,000.00, more or less, which claims are unsecured.

3. The Debtors have had their principal domicile and residence within this district for the 180 days immediately preceding the filing of this petition.

4. The Debtors have had their principal domicile and residence within this district for a longer portion of the 180 days immediately preceding the filing of this petition than they have their domicile and residence in any other district.

5. The Debtors owe debts of more than $5,000.00 and are not farmers, and may be Debtors under Chapter 7 of the Bankruptcy Code.

6. The Debtors are generally not paying their debts as such debts become due.

7. All of the creditors of G. Harold King, Jr., and Shirley G. King computed in the manner specified in 11 U.S.C. 303(b)(2), are less than twelve (12) in number.

WHEREFORE, petitioner prays that this Court enter an order for relief under Chapter 7 of Title 11 of the United States Code against G. Harold King, Jr., and Shirley G. King.

By Attorneys,
KANTROW, SPAHT, WEAVER & WALTER

By: /s/ David S. Rubin

David S. Rubin
P.O. Box 2997
Baton Rouge, Louisiana 70821
Telephone (504) 383-6703

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned Notary Public, personally came and appeared:

JAMES R. AUSTIN

who, after being duly sworn did dispose that,

He is an officer of Fidelity National Bank of Baton Rouge, the petitioner in the foregoing petition, and that the statements contained therein are true according to the best of his knowledge, information and belief.

James R. Austin

SWORN TO AND SUBSCRIBED before me, this 24th day of July, 1981.

Notary Public

PLEASE SERVE DEBTORS
2041 W. Magna Carta
Baton Rouge, Louisiana 70816

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA

IN RE

G. HAROLD KING, JR. AND
SHIRLEY G. KING CASE NUMBER 81-00329

ANSWER OF G. HAROLD KING, JR.
AND SHIRLEY G. KING

REQUEST AND PRAYER OF G. HAROLD KING, JR.,
AND SHIRLEY G. KING
FOR TRIAL BY JURY

G. HAROLD KING, JR., and SHIRLEY G. KING, under reservation of 1) all of their rights under any pending and future Appeal, and 2) all of their rights under any and all Motions previously filed by them herein, and 3) all of their rights under any and all Responses or Oppositions to pleadings filed by the Fidelity National Bank, answer a) the original petition filed by the Fidelity National Bank augmented by Affidavit of the latter filed herein, and b) the petitions in intervention, and further, request and pray for trial by jury.

FIRST: ALLEGATIONS ADMITTED

G. HAROLD KING, JR., and SHIRLEY G. KING admit they are residents of, and domiciled in, the Middle District of Louisiana, and admit they are not farmers.

SECOND: ALLEGATIONS DENIED

G. HAROLD KING, JR., and SHIRLEY G. KING deny they are indebted unto the Fidelity National Bank; deny they are indebted unto the intervening petitioners; deny that any claims of the Fidelity National Bank exceed the value of any lien on their property securing such claims, by $5,000.00 or more; deny that the Fidelity National Bank holds unsecured claims against them for the sum of $64,000.00 more or less; and deny that they are generally

not paying their debts as such debts become due—further alleging that they have been handicapped in paying their debts because of the actions of the Fidelity National Bank—which denials and allegations are particularized herein as follows:

COUNT I

ON THE ALLEGATIONS OF G. HAROLD KING, JR.

1. King Lumber Industries, Inc. had, for many years, its offices in the bank building of the Fidelity National Bank.

2. The law firm of the bank was also the law firm of King Lumber Industries, Inc.

3. From its inception as a corporation, a senior member of this law firm would act in the capacity of Secretary or Assistant Secretary, of King Lumber Industries, Inc.

4. At times pertinent, the Fidelity National Bank would advance funds to King Lumber Industries in the aggregate amount of $500,000.00 more or less.

5. Such funds were advanced largely on an unsecured basis, save and except on the personal endorsement of the late G. Harold King, Sr.

6. That save and except for such endorsement, the Fidelity National Bank, to the best of appearer's knowledge, information, and belief, had neither 1) any security over the accounts receivable of King Lumber Industries, Inc., nor 2) any security over the real estate owned by that corporation.

7. That at all times pertinent, the operations of King Lumber Industries, Inc. were financed largely and primarily by the Fidelity National Bank.

COUNT II

ON THE ALLEGATIONS OF G. HAROLD KING, JR.

1. At times pertinent, the Fidelity National Bank advanced funds to I.H. Rubenstein, Inc., in an amount which, according to the best of appearer's knowledge,

information, and belief, exceeded the amounts advanced by the same bank to King Lumber Industries, Inc.

2. From time to time, Members of the Boards of Directors of both King Lumber Industries, Inc. and the Fidelity National Bank, were also Members of the Board of Directors of I.H. Rubenstein, Inc.

COUNT III

ON THE ALLEGATIONS OF G. HAROLD KING, JR.

1. In 1974 I.H. Rubenstein, Inc. (or "I.H. Rubenstein & Sons, Inc." as it was referred to) entered into an agreement with Capital Investment, Inc. and Louisiana Equity Capital, involving a loan from the latters in the approximate amount of $500,000.00.

2. As of February 1979, there was a balance due on this loan, by I.H. Rubenstein, Inc., in the approximate amount of $225,000.00 plus accrued interest.

3. Capital Investment, Inc. and Louisiana Equity Capital offered to sell this loan and the note representing same, to King Lumber Industries, Inc. at a discount of approximately $30,000.00.

4. Said loan was purchased by King Lumber Industries, Inc., through a transaction whereby:

a) The Fidelity National Bank advanced approximately $30,000.00 of funds, so that this transaction could be consummated.

b) King Lumber Industries, Inc. supplied approximately $10,000.00 pertaining thereto, netting thus about $30,000.00, and

c) King Lumber Industries, Inc. executed two (2) notes to the respective orders of Capital Investment, Inc. and Louisiana Equity Capital, in the combined amount of approximately $165,000.00.

5. I.H. Rubenstein, Inc. subsequently filed for protection under the Bankruptcy Act and/or Bankruptcy Code, and thus, King Lumber Industries, Inc. suffered an extensive loss as a result of this transaction.

COUNT IV

ON THE ALLEGATIONS OF G. HAROLD KING, JR.

1. On or about December of 1978, King Lumber Industries, Inc. purchased a note of Jeshep's, Inc. from I.H. Rubenstein, Inc., for the approximate amount of $200,000.00.

2. In connection with this transaction, I.H. Rubenstein, Inc. liquidated a $50,000.00 note wherein it was the maker thereof, and the $50,000.00 was re-invested into the business of King Lumber Industries, Inc.

3. Jeshep's, Inc. subsequently filed for protection under the Bankruptcy Act and/or Bankruptcy Code, and thus, King Lumber Industries, Inc. suffered an extensive loss as a result of this transaction.

COUNT V

ON THE ALLEGATIONS OF G. HAROLD KING, JR.

1. Prior to March 6, 1980, and to the best of appearer's knowledge, information, and belief, appearer G. HAROLD KING, JR. had never endorsed any obligation of King Lumber Industries, Inc. to the Fidelity National Bank, and also, prior to the same date, the Fidelity National Bank had never held nor requested collateral security re any obligation of King Lumber Industries, Inc., save and except the personal endorsement of appearer's late father, G. Harold King, Sr.

2. That at all times pertinent, and from time to time, King Lumber Industries, Inc. supplied financial reports and data to the Fidelity National Bank, whereby the latter had full knowledge of the financial condition of the former.

3. On or about March 6, 1980 King Lumber Industries, Inc., had approximately $500,000.00 of unsecured trade creditors, as well as obligations with banks other than the Fidelity National.

3. In what appears as an abrupt reversal of policy or practice, the Fidelity National bank demanded a Collateral Mortgage and other security, in reference to prior

obligations of King Lumber Industries, Inc., and irrespective of the fact that no fresh advance of capital was to be given by the bank.

4. Appearer avers that he truly believes that had either Victor Sachse or Hopkins Breazeale, Jr. been alive at the time, that neither would have condoned the request of the bank, nor permitted execution thereof, but that both of these eminent Attorneys had died in 1979, thereby leaving a void that your Appearer found it difficult to fill.

5. Appearer protested and protested emphatically to the said Cecil D. Spillman, that execution of such Collateral Mortgage and other Security (especially since the bank was not advancing any fresh funds) would be unfair to the mass of trade creditors of King Lumber Industries, Inc. and to the other financial institutions.

6. Appearer specifically avers that all of his protests were to no avail, and that the Fidelity National Bank demanded execution of such Security.

7. APPEARER SPECIFICALLY AVERS THAT THE COLLATERAL MORTGAGE DATED MARCH 6, 1980 AND OF RECORD HEREIN, WAS NOT AND HAS NEVER BEEN, AN ACT EXECUTED THROUGH THE FREE WILL OF APPEARER.

8. Further, Appearer specifically alleges that had he refused to carry out the request of said bank, as outrageous as it appeared to him, that Appearer was fearful that perhaps other actions could be taken by the bank which would further endanger the rights of the trade creditors and other financial institutions—and thereby augment a potentially greater loss, in their behalf.

COUNT VI

ON THE ALLEGATIONS OF G. HAROLD KING, JR.

1. The $250,000.00 Note of King Lumber Industries, Inc., dated March 7, 1980, did not represent any fresh advance of funds by the bank to the Maker, but allegedly

represented advances made prior to the execution of the Collateral Mortgage.

2. Appearer specifically alleges that his signature on the back of this Note, may not in law constitute a personal endorsement of Appearer, since it appears underneath the designation of KING LUMBER INDUSTRIES, INC.

3. The $23,529.44 Note of King Lumber Industries, Inc., dated June 5, 1980, did not represent any fresh advance of funds by the bank to the Maker. In fact, such note never represented any advance of funds to the Maker, within the knowledge of the bank. THIS NOTE WAS DEMANDED BY THE BANK TO REIMBURSE THE BANK FOR THE $20,000.00 ADVANCED TOWARDS CONSUMMATION AND PURCHASE OF THE I.H. RUBENSTEIN, INC. NOTE—which transaction is referred to in COUNT III herein.

King Lumber Industries, Inc. was neither Maker nor endorser on the $20,000.00 obligation, and the $23,529.44 amount represented the prior advance of $20,000.00 plus interest.

4. The $200,000.00 Note of King Lumber Industries, Inc., dated June 16, 1980 did not represent any fresh advance of funds to the Maker, but allegedly represented deposits or funds advanced prior to the execution of the Collateral Mortgage.

Appearer specifically alleges that his signature on the back of this Note, may not in law constitute a personal endorsement of Appearer, since it appears beneath the designation of KING LUMBER INDUSTRIES, INC.

5. The $60,000.00 (specifically $60,912.33) Note of G. Harold King, III dated May 14, 1980 represented neither any advance of funds to King Lumber Industries, Inc., nor to Appearer. This loan was for purchase of stock in the former.

6. The $12,000.00 Note of Appearer dated January 30, 1981, did not represent any fresh advance of funds by the bank.

7. ALL OF THESE NOTES SHOW ON THEIR FACE THAT THEY ARE SECURED RATHER THAN UNSECURED OBLIGATIONS.

8. In particular reference to the $60,912.33 Note, Appearer believes that the bank released and discharged the Maker of this Note, prior to the time that its Affidavit was filed herein, showing it as a fully viable obligation.

9. In particular reference to ALL Notes held by the Fidelity National Bank and petitioners in intervention, whereby G. HAROLD KING, JR., as an individual and as oposed to being President of King Lumber Industries, Inc., is deemed to have endorsed notes, and insofar only as this Court deems certain signatures of Appearer as constituting, in law, the personal endorsement of Appearer, the latter specifically affirms that 1) at no time was your Appearer requested to obligate the legal community existing between Appearer and his wife, Shirley G. King, and 2) at no time did your Appearer have the intention of binding such estate.

COUNT VII

ON THE ALLEGATIONS OF G. HAROLD KING, JR.

1. The Collateral Mortgage dated March 6, 1980 became a weapon of intimidation and harassment in the hands of the Fidelity National Bank, and such intimidation and harassment was of the same force and effect on your Appearer as though the Fidelity National Bank had pointed a loaded weapon.

2. The Fidelity National Bank, primarily through Cecil D. Spillman, made repeated telephone calls to the home of your Appearer, to such a degree that the life of your Appearer and his wife were rendered unbearable.

3. These calls and other harassment were of such intensity that on or about July of 1980, your Appearer (against his better judgment) authorized the expenditure of approximately $5,000.00 of much needed funds by King Lumber Industries, Inc., in an attempt to obtain a loan commitment from another source, so that all amounts

allegedly due under the Collateral Mortgage, could be paid.

4. The Collateral Mortgage covered three (3) parcels of real estate owned by King Lumber Industries, Inc., two (2) of the parcels being in East Baton Rouge Parish, and one (1) being in Livingston Parish.

5. ONE OF THE PARCELS IN EAST BATON ROUGE PARISH CONSTITUTED THE HOME OCCUPIED BY APPEARER'S LATE FATHER, G. HAROLD KING, SR., and this fact was well within the knowledge of the Fidelity National Bank.

6. Thus, Appearer was at all times pertinent at the mercy of Fidelity National Bank, in that NOT to abide by all the wishes of the bank might have endangered foreclosure on the parcel occupied by Appearer's late father, WITH THE KNOWLEDGE THAT SUCH FORECLOSURE COULD POSSIBLY KILL THE LATTER!

7. Being thus at the mercy of the said bank, your Appearer was forced, against his better judgment, to condone sale of the other parcel in East Baton Rouge Parish, under the basis where substantially all of the proceeds of sale went to satisfy the Fidelity National Bank, and NONE went to satisfy either the trade creditors or other financial institutions.

8. Again at the mercy of said bank, your Appearer was forced, against his better judgment, to condone sale of the parcel in East Baton Rouge Parish occupied by Appearer's father, under terms whereby substantially all of the proceeds of sale went to satisfy the Fidelity National Bank, and NONE went to satisfy either the trade creditors or other financial entities.

9. That both of the sales referred to in Paragraphs "7" and "8" above, were subject to first mortgage holders other than the Fidelity National Bank. These were paid with the first proceeds of sale, according to their rank.

10. That when Appearer and his wife purchased the

third parcel, namely, the parcel in Livingston Parish, your Appearer was not then in position to demand cancellation of the bank's Mortgage pertaining thereto, because of the fear that foreclosure on the parcel occupied by Appearer's father might kill him.

11. Nevertheless, Appearer believed that the bank would act in good faith and ultimately cancel same, as soon as the remaining parcels in East Baton Rouge Parish were sold.

12. In spite of the fact that the Fidelity National Bank ultimately obtained from King Lumber Industries, Inc., the good and valuable Mortgage Notes of a third party (having an actual cash value of $120,000.00) which Appearer and his wife had transferred to King Lumber Industries, Inc., as part of the sale consideration or price on the Livingston Parish property, THE FIDELITY NATIONAL BANK FAILED OR REFUSED TO RELEASE THE LIVINGSTON PARISH PROPERTY FROM THE COLLATERAL MORTGAGE, irrespective of the fact that the bank released the other two (2) properties from this same mortgage.

13. The parcel occupied by Appearer's father as a home was sold on February 12, 1981. Appearer did not solicit any condition to this sale, but did receive an understanding from the purchaser that Appearer's father would be permitted to remain therein for an indefinite term of a few months. APPEARER'S FATHER DIED IN AUGUST OF THE SAME YEAR!

14. Appearer specifically alleges that the failure or refusal of the bank to afford equality of treatment to Appearer and his wife, that is, the failure or refusal to release the Collateral Mortgage on property which Appearer and his wife purchased from King Lumber Industries, Inc., while granting said release to the other properties, constitutes brutal and inequitable treatment of Appearer and his wife.

15. That the Fidelity National Bank knows and knew full well, that the sole and only reason whereby Appearer affixed his signature to the three (3) Notes of King Lumber Industries, Inc., attached to the bank's Affidavit, in addition to his signature as President of King Lumber Industries, Inc., was on account of concern for Appearer's father—which concern caused Appearer to be at the mercy of the said bank.

COUNT VIII

ON THE ALLEGATIONS OF SHIRLEY G. KING

1. Appearer SHIRLEY G. KING is without knowledge relative to the allegations made in COUNTS I through VII herein, and thus responds solely and only to matters within her own knowledge and information.

2. Appearer believes she has been VICTIMIZED.

3. Appearer was never an officer, agent, employee, or Member of the Board of Directors of King Lumber Industries, Inc., and thus never took part in its affairs.

4. Appearer has no recollection whatever of ever signing documents held either by Fidelity National Bank or petitioners in intervention. NOR WAS APPEARER EVER REQUESTED TO DO SO! Thus, Appearer at no time took part in any discussions or negotiations leading up to the signing of such documents.

5. Appearer was asked by her husband to appear at a law office in the Fidelity National Bank Building, relative to the purchase by Appearer and her husband, of the Livingston Parish property, from King Lumber Industries, Inc. She did so.

6. Appearer understands that as a result of this sale, she obligated herself 1) on the assumption of a first mortgage on the Livingston Parish property to CITIZENS SAVINGS AND LOAN ASSOCIATION of Baton Rouge Louisiana, and 2) on a Note to King Lumber Industries, Inc. in the amount of $50,000.00, which Appearer understands has now been reduced to approximately

$42,500.00. These particulars appear in the Act of Sale which is part of this record.

7. At this appearance, Appearer was at no time apprised of the fact that there was a Collateral Mortgage held by the Fidelity National Bank, on the property being purchased. SUCH FACT WAS MENTIONED NEITHER IN THE ACT OF SALE, NOR IN ANY DOCUMENT SHOWN TO APPEARER AT THE TIME OF SALE, NOR IN ANY DISCUSSION HELD AT THE TIME OF SALE.

8. That Appearer and her husband were the owners of good and valuable Mortgage Notes of a third party in the total amount of $120,00.00—which Notes were used in part payment of the purchase price on the Livingston Parish property.

9. THAT APPEARER WOULD HAVE NEVER TRANSFERRED THESE NOTES AWAY AS PART OF THE PURCHASE PRICE, AND APPEARER WOULD HAVE NEVER OBLIGATED HERSELF ON AN ADDITIONAL $50,000.00 NOTE, IF APPEARER HAD BEEN MADE AWARE OF THE COLLATERAL MORTGAGE HELD BY THE BANK, ON THE PROPERTY BEING PURCHASED.

10. That Appearer seeks protection of all of her rights, as afforded her under both Federal and State law—especially Articles 2325 through 2369 of the Louisiana Civil Code.

COUNT IX

ON THE ALLEGATIONS OF G. HAROLD KING, JR. AND SHIRLEY G. KING

1. That the conduct and actions on the part of the Fidelity National Bank warrant this Court subordinating all of the claim of the Fidelity National Bank, and all of their security (including the transfer of any lien to this Estate) to the rights of 1) the trade creditors of King Lumber Industries, Inc. and 2) the creditors of this Estate excluding

the Fidelity National Bank—all in accordance with Sec. 510(c) of the Bankruptcy Code.

COUNT X
ON THE ALLEGATIONS OF HAROLD KING, JR. AND SHIRLEY G. KING

1. That the failure or refusal of the Fidelity National Bank to release the mortgage on the Livingston Parish property purchased by your Appearers, and the bank's other conduct, have caused such mental anguish to Appearers, and have caused them to undergo such hardship in paying just bills, that your Appearers are entitled to a claim against the Fidelity National Bank of Baton Rouge, in the amount of $300,000.00, under RULE 112 of the Rules of Bankruptcy Procedure, and other provisions of law.

COUNT XI
ON THE ALLEGATIONS OF G. HAROLD KING, JR. AND SHIRLEY G. KING

1. That appearers G. HAROLD KING, JR. and SHIRLEY G. KING have the absolute right to a Jury Trial of all issues so triable, and have the further right (under Interim Rule 9001 and RULE 115 of the Rules of Bankruptcy Procedure) that a District Judge conduct such trial by jury by placing this action on the calendar of the District Court as a Jury Action.

2. That Appearers G. HAROLD KING, JR. and SHIRLEY G. KING seek protecton of all of their rights, under the Constitution and laws of the United States, including Interim Rule 9001 and RULE 115 of the Rules of Bankruptcy Procedure, and accordingly, herewith request and pray for

A) TRIAL BY JURY, and
B) TRIAL BY JURY AS A JURY ACTION, before a
C) UNITED STATES DISTRICT COURT, and
D) UNITED STATES DISTRICT JUDGE.

PRAYER

WHEREFORE G.HAROLD KING, JR. and SHIRLEY G. KING pray for Trial by Jury, and Trial by Jury as a Jury Action, before a United States District Court, and United States District Judge, of all issues so triable, to the ultimate extent authorized by Interim Rule 9001 and RULE 115 of the Rules of Bankruptcy Procedure, and the Constitution and Laws of the United States.

1. That not by way of limitation, but only by way of illustration, that said Trial by Jury consider the issues:

a) Whether the Fidelity National Bank properly evaluated its security, so as to allege itself to be an unsecured creditor.

b) Whether the Fidelity National Bank, was in fact, the holder of unsecured claims in the amount of $64,000.00 more or less.

c) Whether the Fidelity National Bank was, in fact, the holder of any unsecured claim at least $5,000.00 more than the value of any lien on the property of Defendants, as required by Sec. 303(b) of the Bankruptcy Code.

d) Whether the Fidelity National Bank filed its petition in good or bad faith.

e) Whether the Fidelity National Bank discriminated against Defendants, by failing or refusing to cancel the Collateral Mortgage held by the bank, over the property of the Defendant, while retaining $120,000.00 of Mortgage Notes formerly owned by Defendants.

f) Whether the Defendants are generally paying their undisputed debts.

g) Whether the Defendants have been severely handicapped in paying undisputed debts, on account of the failure or refusal by the Fidelity National Bank, to treat Defendants according to the same criterion of release of mortgage, which the bank afforded to others.

2. That all security held by the Fidelity National Bank be deemed subordinated to the claims and rights of all other

creditors of Defendants, including the trade creditors of King Lumber Industries, Inc., in accordance with Sec. 510(c) of the Bankruptcy Code.

3. That Defendants recover by way of offset or in order to defeat this action, a sum not in excess of $300,000.00 from Fidelity National Bank, on condition that whatever sum is recovered is made available for all of the other creditors of Defendants, and the trade creditors of King Lumber Industries, Inc.

4. THAT THERE BE A SPECIAL FINDING BY THE JURY ON WHETHER G. HAROLD KING, JR. WAS UNDULY PRESSURED BY THE FIDELITY NATIONAL BANK, IN REFERENCE TO a) THE COLLATERAL MORTGAGE, AND b) THE NOTES OF KING LUMBER INDUSTRIES, INC., IN THE PLACEMENT OF HIS SIGNATURE THEREON.

5. That there be a special finding by the Jury on whether the Collateral Mortgage held by the Fidelity National Bank, and the signature of Defendant G. Harold King, Jr., were the result of an impermissible strategy on the part of the Fidelity National Bank, to gain a favored or preferential treatment on the bank's alleged claims, over the claims of other creditors of Defendants, and the trade creditors of King Lumber Industries, Inc.

6. That there be a special finding by the Jury on whether the Defendant G. Shirley King ever obligated herself on any obligation alleged herein, and

7. THAT THERE BE A SPECIAL FINDING BY THE JURY ON WHETHER ANY ALLEGED DEBT HEREIN IS A DEBT OF THE LEGAL COMMUNITY EXISTING BETWEEN G. HAROLD KING, JR., AND SHIRLEY G. KING, UNDER LOUISIANA LAW.

8. That after all due proceedings had, that the petition and intervening petitions be dismissed herein, without prejudice to these parties of asserting before proper tribunals, their alleged claims and/or claims of lien.

9. AND FOR ALL OTHER RELIEF NECESSARY.

Respectfully submitted
BY ATTORNEY

FRANZ JOSEPH BADDOCK
P.O. Box 3573
Baton Rouge, Louisiana 70821
(Tel.: (504) 343-9194)

ANNEXED:
Affidavits

CERTIFICATE

I certify that I have this date, by prepaid mail, forwarded copies of the foregoing to Mr. David Rubin, Esq., P.O. Box 2997, Baton Rouge, Louisiana 70821 (counsel for the Fidelity National Bank) and to Mr. Frederick R. Tulley, Esq., P.O. Box 2471, Baton Rouge, Louisiana 70821 (counsel for intervenors). BATON ROUGE, Louisiana, this 11th day of September, 1981.

/s/ Franz Joseph Baddock
FRANZ JOSEPH BADDOCK

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally appeared

G. HAROLD KING, JR.

who, being first duly sworn, did depose that the factual information contained in COUNTS I through VII was given by him to his counsel, and that he has read these allegations and affirms that they are true and correct, to the best of his knowledge, information, and belief.

SIGNED /s/ G. Harold King, Jr.
G. HAROLD KING, JR.

SWORN AND SUBSCRIBED TO, Before Me, at Baton Rouge, Louisiana, on this the 11th day of September, 1981.

/s/ Franz Joseph Baddock

Franz Joseph Baddock
NOTARY PUBLIC

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally appeared

SHIRLEY G. KING

who, being first duly sworn, did depose that the factual information contained in COUNT VIII was given by her to her counsel, and that she has read these allegations and affirms that they are true and correct, to the best of her knowledge, information, and belief.

SIGNED /s/ Shirley G. King

SHIRLEY G. KING

SWORN AND SUBSCRIBED TO, Before Me, at Baton Rouge, Louisiana, on this the 11th day of September, 1981.

/s/ Franz Joseph Baddock

Franz Joseph Baddock
NOTARY PUBLIC

G. Harold KING, Jr., and Shirley G. King, Plaintiffs-Appellants,

v.

FIDELITY NATIONAL BANK OF BATON ROUGE, Capital Investment Inc. and Louisiana Equity Capital Co., Defendants-Appellees.

No. 82-3379.

United States Court of Appeals, Fifth Circuit.

Aug. 15, 1983

Appeal was taken from a judgment of the United States District Court for the Middle District of Louisiana, John V. Parker, Chief Judge, affirming various rulings of the bankruptcy court. The Court of Appeals held that: (1) it was error to join debtor's wife in involuntary petition, and appropriate relief was her dismissal; (2) debtors made no argument precluding award of sanctions for their failure to appear at scheduled examination; (3) fact that debtor had sued both intervening creditors in state court before bankruptcy proceedings began did not prevent their intervention; and (4) even assuming that debtors had right to have question of appropriateness of bankruptcy court's entry of order for relief on bank's motion for summary judgment determined by an Article III court, such a determination had been made.

Affirmed in part, vacated and remanded in part.

1. Bankruptcy Key 67, 92

Bankruptcy Code makes no provision for joint involuntary cases, and therefore it was error to join debtor's wife in involuntary petition, warranting her dismissal.

Fed.Rules Civ.Proc. Rule 21, 28 U.S.C.A.; Bankr.Code, 11 U.S.C.A. §§ 302(a), 303.

2. Federal Civil Procedure Key 1451

Even if a subpoena were not a court order, discovery sanction was still available, under Federal rules of Civil Procedure governing, inter alia, failure of party to respond to request for inspection, relative to debtors' failure to appear at examination. Interim Rules Bankr.Proc.Rule 1008, 11 U.S.C.A.; Rules Bankr.Proc.Rule 205, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 37(d), 28 U.S.C.A.

3. Bankruptcy Key 233

Where not granted before scheduled deposition, motion to set aside subpoena was ineffective to excuse debtors from compliance with subpoena.

4. Federal Civil Procedure Key 1353

Since time for deposition had passed, it was too late to attack validity of subpoena.

5. Bankruptcy Key 299

Fact that debtor had sued both intervening creditors in state court before bankruptcy proceedings began did not prevent their intervention, because there was absolutely no evidence of bad faith, and because intervention could not have had complained of effect of either preventing trial of state-court suits or having suits managed by interim trustee instead of by debtor. Bankr.Code, 11 U.S.C.A. §§ 524(a)(2), 727(b).

6. Jury Key 31(7)

Debtors were not unconstitutionally denied their right to trial by jury by granting of bank's motion for summary

judgment in involuntary bankruptcy proceeding.

7. Federal Civil Procedure Key 2547

Assuming that debtors had right to have Article III court determine question of their objections to bankruptcy court's entry of order for relief on bank's motion for summary judgment in involuntary bankruptcy proceeding, they had such determination, because both district court and Court of Appeals were Article III courts, applying same summary judgment standard as bankruptcy court. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.; U.S.C.A. Const.Art. 3, § 1 et seq.

Franz J. Baddock, Baton Rouge, La., for plantiffs-appellants.

Kantrow, Spaht, Weaver & Walter, David S. Rubin, Lee C. Kantrow, Baton Rouge, La., for defendants-appellees.

Frederick R. Tulley, Louis M. Phillips, Baton Rouge, La., for La. Equity Capital Co. and Capital Investment.

Appeal from the United States District Court for the Middle District of Louisiana.

Before GARZA, RANDALL and GARWOOD, Circuit Judges.

PER CURIAM:

This case involves appeals from the district court's affirmance of various rulings of the bankruptcy court. For the reasons set forth below, we affirm in part and vacate and remand in part.

I. FACTUAL AND PROCEDURAL BACKGROUND.

On July 24, 1981, appellee Fidelity National Bank filed a joint involuntary chapter 7 bankruptcy petition against the appellants, G. Harold and Shirley G. King. *See* 11

U.S.C. § 303(b)(2) (Supp. V 1981). After the Kings filed a motion for a more definite statement and motions to dismiss for failure to state a claim on which relief could be granted and lack of personal jurisdiction, the bank gave notice that it intended to examine the Kings about their financial affairs. *See* Interim Bankr.R. 1008;[1] Bankr.R. 205. On August 7, 1981, Subpoenas were served on the Kings to compel their appearance for the examination on August 14. The day before the scheduled examination, the Kings filed a motion "to set aside" the notice and subpoena. On the advice of counsel, they did not attend the examination. The bank moved for sanctions for nonappearance. The bankruptcy court held a hearing and ordered the Kings' attorney to pay the bank $250 to reimburse it for the costs it had incurred in connection with the examination.

In the meantime, Capital Investments, Inc. and Louisiana Equity Capital Corporation moved to intervene as creditors in the involuntary proceeding. The Kings opposed the interventions, but after a hearing the bankruptcy court permitted them.[2]

Fidelity National Bank and the Kings each moved for summary judgment on the propriety of an order for relief. The bankruptcy court denied the Kings' motions and granted the bank's.

The Kings appealed to the district court on a variety of grounds, of which the only ones pertinent to this appeal

[1]The Interim Bankruptcy Rules have been adopted by the bankruptcy courts of the Middle District of Louisiana.

[2]Capital Investments, Inc. and Louisiana Equity Capital Corp. are listed as appellees in the record, but neither company has filed a brief or otherwise appeared in this appeal.

are:[3] that Shirley King was not a proper party to the involuntary bankruptcy; that discovery sanctions should not have been imposed on their counsel; that the

[3]The Kings included a variety of other questions in their notices of appeal to this court, but these questions were not addressed in their briefs and are thus waived.

interventions should have been denied; that summary judgment was improperly granted; and that the Kings had been improperly denied their rights to a jury trial and to a decision by an article III court on the question of the appropriateness of the order for relief. The district court affirmed the bankruptcy court in full; the Kings raise the same contentions here. We address each argument in turn.

II. INCLUSION OF SHIRLEY KING.

The bank filed its petition for involuntary bankruptcy because it held several notes guaranteed by Harold King that were in default. Shirley King was joined in the petition merely because she was Harold King's wife and his obligations were presumptively those of the marital community. The Kings have strenuously objected to her inclusion in the proceedings.

[1] It was error to join Shirley King in the involuntary petition, for the Bankruptcy Code makes no provision for joint involuntary cases. *Compare* 11 U.S.C. § 302(a) (Supp. V 1981) ("A joint case...is commenced by the filing...of a single petition...*by an individual that may be a debtor...and such individual's spouse.*") (emphasis added), *with id.* § 303 (making no mention of joint cases and referring throughout to "the debtor" in the singular); *see also* S.Rep. No. 989, 95th Cong., 2d Sess. 32 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad.News 5787, 5818 ("A joint case is a *voluntary bankruptcy case* concerning a wife and husband.")

(emphasis added); H.R.Rep. No. 595, 95th Cong., 1st Sess. 321 (1977), *reprinted in* 1978 U.S.Code Cong. & Ad.News 5963, 6277 (same); 2 L. King, *Collier on Bankruptcy* ¶303.07[a] (15th ed. 1979) ("A joint involuntary case may not be filed against a debtor and spouse.").

The question now is what remedy we should select for this error. The usual remedy for misjoinder is either to drop the misjoined party or to sever the claims. *See* Fed.R.Civ.P. 21; 7 C. Wright & A. Miller, *Federal Practice & Procedure* § 1684 (1972). Federal Rule of Civil Procedure 21 is not, however, directly applicable here. *See* Bankr.R. 721 (Fed.R.Civ.P. 21 applicable in adversary proceedings in bankruptcy); Bankr.R. 121 (listing adversary proceeding rules applicable to contested petitions; Bankr.R. 721 not listed). *Collier's,* however, recommends that Bankruptcy Rule 721, and thus Federal rule of Civil Procedure 21, should be applied to cases of joinder of parties other than the debtor as defendants in an involuntary petition. 2 L. King, *Collier on Bankruptcy* ¶303.15[10] (15th ed. 1979). We think that that is the most sensible way to deal with a situation that is not dealt with in the rules simply because it ought never to arise.

Under Federal Rule of Civil Procedure 21, we believe that the preferable course is to dismiss Shirley King from these proceedings.[4] Her inclusion is not harmless error, because she has been adjudicated a bankrupt and any separate property she may own has been included in the estate.[5] *See* 11 U.S.C. §§ 727(a)(8), 1141(d)(3)(C) (Supp. V

[4]It is undisputed that Harold King, as guarantor of the notes on which the bank's claims are based, is a proper party to this case, although he contests the propriety of the order for relief.

[5]The bank has made an uncontradicted assertion that Shirley King had no separate property when the petition was filed, but that does not affirmatively appear from the record and would in any event not change our result.

1981) (discharge under chapters 7 or 11 not available to person who received chapter 7 discharge in case filed less than six years before current petition); *id.* § 541(a) (property of the estate). The creditors will not be prejudiced by Shirley King's dismissal; all have asserted claims against her only by virtue of her membership in the marital community; and Harold King's inclusion in the petition brings all of the community property into the bankruptcy estate. 11 U.S.C. § 541(a)(2)(A) (Supp. V. 1981) (estate includes all community property under the sole or joint management of the debtor); La.Civ.Code Ann. art. 2346 (West Supp. 1983) (with limited exceptions not relevant here, each spouse has full management power over community property). There

190 712 FEDERAL REPORTER, 2d SERIES

is thus no reason simply to sever the case against Shirley King, and indeed it might be impossible to do so at this stage of the proceedings. We therefore vacate that portion of the district court's judgment affirming the entry of an order for relief against Shirley King and remand the case to the district court for entry of an order directing the bankruptcy court to vacate the order for relief against Shirley King and to dismiss the petition against her.

III. DISCOVERY SANCTIONS.

Federal Rule of Civil Procedure 37 applies to a Bankruptcy Rule 205 examination in a case involving a contested petition. Bankr.R. 121 (Bankr.R. 737 applicable in cases involving contested petitions); Bankr.R. 737 (Fed.R.Civ.P. 37 applies to adversary proceedings). This does not appear to have been changed by Interim Bankruptcy Rule 1008 (providing for an additional discovery procedure with sanctions for failure to comply "including those specified in" Fed.R.Cov.P. 37(b)(2)(A),

(B), and (C); rule 1008 expressly leaves the procedures under Bankruptcy Rules 121 and 205 intact.

[2] Federal Rule of Civil Procedure 37 provides for the sanctions levied here (expenses caused by failure to appear at a deposition) under two sets of circumstances; when the failure is in disobedience of a court order, Fed.R.Civ.P. 37(b), and when there is no court order but the opposing party gave notice of the deposition, Fed.R.Civ.P. 37(d). The Kings' defense against the sanctions is based in part on the theory that a subpoena is not a court order.[6] Not surprisingly, they cite no authority for this novel proposition.[7] Even if a subpoena were not a court order (which is not the case), the sanction here would still have been available under rule 37(d).

[3, 4] The Kings raise two other defenses for their failure to appear: that the subpoena was defective, and that they made a timely motion to set it aside. Neither defense is adequate here. The motion to set aside the subpoena was arguably technically flawed, but the greater error in the Kings' analysis is that a motion to quash must be not only made but *granted* before the scheduled deposition to excuse compliance. *See United States v. Portland Cement Co.*, 338 F.2d 798, 803 (10th Cir. 1964) (under earlier version of rules, order conditioning discovery must be obtained, if at all, before discovery takes place); *Pioche Mines Consolidated, Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964), *cert. denied*, 380 U.S. 956, 85 S.Ct. 1082, 13 L.Ed.2d

[6]They do not actually argue that a subpoena is not a court order for purposes of rule 37, but rather that it is not a court order for purposes of Bankruptcy Rule 205(a) ("the court may order" examination). The argument is equally specious in both contexts.

[7]This argument is unfortunately characteristic of the Kings' briefs, which are noteworthy both for their excessive use of emotional overstatement, capital letters, underscoring, and exclamation points, and for their dearth of legal analysis and citation to apposite authority.

972 (1965) under earlier version of rules, motion to quash notice of deposition must be not only filed but acted on before scheduled time of deposition to avoid sanctions). The motion to set aside the subpoena was thus ineffective to excuse the Kings from compliance with the subpoena. Further, since the time for the deposition has passed, it is too late to attack the validity of the subpoena.[8] *See Pioche, supra.*

[8]The attacks on the subpoena are in any event meritless. The first is that it was not the court order required under Bankruptcy Rule 205(a) to compel an examination; *see* note 6 and accompanying text, *supra*, for a discussion of this claim. The next contention is that it was improper to order an examination while motions to dismiss the case were pending. There is no requirement that depositions await disposition of all motions to dismiss the case. *Se* Bankr.R. 121 (applying Bankr.R. 730 to proceedings on contested petitions); Bankr.R. 730 (adopting Fed.R.Civ.P. 30 with changes to conform to adversary proceedings in bankruptcy); Fed.R.Civ.P. 30(a) (no requirement that motions to dismiss be disposed of before depositions taken). Indeed, such a requirement would permit any party to delay discovery indefinitely without a valid reason.

Finally, the Kings allege that it was improper to order their examinations before they filed their answer. This argument is based on Interim Bankruptcy Rule 1008, which provides for examination in court of a debtor who "denies" the allegation that he is not generally paying his debts as they come due. The Kings claim that such a denial can only be made in the debtor's answer. The Kings, however, totally overlook the fact that this examination was ordered not under Interim Rule 1008, but under Bankruptcy Rule 205, which Interim Rule 1008 expressly left undisturbed and which contains no requirement that the debtor have denied anything. This contention thus also fails.

The Kings have thus made no argument that precludes the award of sanctions here. The $250 charge assessed seems quite reasonable, as does its assessment against the attorney who advised the Kings to disobey the subpoena rather than

against the Kings themselves. Federal Rule of Civil Procedure 37 expressly authorizes such sanctions against attorneys. We therefore affirm the district court's affirmance of the award here.

IV. INTERVENTIONS.

[5] Harold King had sued both Capital Investment, Inc. and Lousiana Equity Capital Corporation in state court before the bankruptcy proceedings began. He objects to their intervention in this case because he claims they were merely engaging in a bad-faith effort either to prevent trial of his state-court suits or to have the suits managed by the interim trustee instead of by him. These contentions are frivolous. There is absolutely no evidence of bad faith, nor could the intervention have had either of the complained-of effects.[9] Indeed, had the intervenors chosen not to participate in the bankruptcy proceedings, King would have been able to plead a discharge received in these proceedings as an absolute defense to their counterclaims in the state-court suits. 11 U.S.C. §§ 727(b), 524(a)(2) (Supp. V. 1981). We affirm the district court's affirmance of the grants of intervention.

V. SUMMARY JUDGMENT

The Kings have two basic objections to the bankruptcy court's entry of the order for relief on the bank's motion for summary judgment. The first is a wholly unsupportable

[9]It is unclear whether the allegations about preventing a trial are based on the automatic stay, 11 U.S.C. § 362 (a) (Supp. V. 1981), or on the Kings' violent dislike of summary judgment procedures, discussed in part V, *infra*. The automatic stay would apply, if at all, without regard to the defendants' status as intervenors in the bankruptcy, and summary judgment procedures are available in both state court and bankruptcy court. Similarly, the trustee's right to prosecute the suit arises from the fact that Harold King's cause of action became property of the estate, 11 U.S.C. §§ 541(a), 323 (Supp. V 1981), and not from the defendants' applications for intervention.

constitutional argument: that they were unconstitutionally denied their right to trial by jury and to determination of the issue by an article III court.

[6] Assuming that the Kings had a right to jury trial on the question, it was not denied here. Summary judgment is not unconstitutional; where there are no disputed issues of material fact for a jury to decide, no jury is necessary. Indeed, the Kings' own motions for summary judgment on the issue indicate both a belief that a jury was not necessary and a desire to have the court decide whether an order for relief was appropriate.

[7] Similarly, assuming that the Kings had a right to have this question determined by an article III court, they have had such a determination. Both the district court and this court are article III courts, and we both apply the same summary judgment standard as the bankruptcy court: summary judgment is appropriate only where, viewing the facts in the light most favorable to the nonmovant, there are no genuine issues of material fact and judgment for the movant is appropriate as a matter of law. Fed.R.Civ.P. 56(c). The Kings make a half-hearted allegation that neither the bankruptcy court nor the district court found that summary judgment was proper and that it was in fact improper. The lower courts clearly thought that summary judgment was warranted or they would not have granted it. The Kings do not point to any alleged issue of material fact—they allege many fact questions, but none is material to the narrow issue of entry of an order of relief—and we find none in the record. We therefore affirm the district court's affirmance of the entry of the order of relief on

motion for summary judgment, although of course only as to Harold King. *See* part II, *supra*.

VI. CONCLUSION.

We find that all of the Kings' contentions are without merit, except for the argument that Shirley King was not a proper party to the involuntary proceedings. We therefore affirm the judgment of the district court in all respects other than its affirmance of the bankruptcy court's entry of the order for relief against Shirley King; we vacate the affirmance of that order and remand with instructions to direct the bankruptcy court to vacate the order for relief against Shirley King and dismiss the petition against her.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3379

U.S. COURT OF APPEALS
FILED
Oct. 11, 1983
GILBERT F. GANUCHEAU
CLERK

G. HAROLD KING, JR. and
SHIRLEY G. KING,
Plaintiffs-Appellants,

versus

FIDELITY NATIONAL BANK OF BATON ROUGE,
CAPITAL INVESTMENT INC. and
LOUISIANA EQUITY CAPITAL CO.,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana

ON PETITIONS FOR REHEARING
(October 11, 1983)

Before GARZA, RANDALL and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:
CAROLYN DINEEN RANDALL

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.
REHG-5

NOMINATIONS OF GEORGE H. KING, JR., AND KARL BRANDT

HEARING
before the
COMMITTEE ON BANKING AND CURRENCY
UNITED STATES SENATE
Eighty-Sixth Congress
First Session
on
The Nominations of George H. King, Jr., to be a member of the Board of Governors of the Federal Reserve System; and Karl Brandt to be a Member of the Council of Economic Advisers

MARCH 11, 1959

Printed for the use of the Committee on Banking and Currency

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1959

38053

CERTIFICATE OF SERVICE

I certify under Rule 28.5, that I have this date, by prepaid mail, forwarded three (3) copies of the foregoing Appendix to MR. DAVID S. RUBIN, Attorney, P.O. Box 2997, Baton Rouge, Louisiana 70821, who is counsel for the FIDELITY NATIONAL BANK OF BATON ROUGE.

I further certify (in accordance with 712 F.2d 188, 189 Note 2), that since neither Capital Investments, Inc. nor Louisiana Equity Capital Corp. filed any brief or otherwise appeared in the appeal before the United States Court of Appeals for the fifth Circuit, that no service was necessary on these entities under Rule 28.5, and that all parties required to be served have been served under the said Rule 28.5.

Nevertheless, to apprise all entities that may have interest in this matter, I further certify that I have served an information copy of the same Appendix on Mr. FREDERICK R. TULLEY, Attorney, P.O. Box 2471, Baton Rouge, Louisiana 7821, Mr. CHARLES N. MALONE, Attorney, P.O. Box 3233, Baton Rouge, Louisiana 70821, and Mr. MICHAEL T. PERRY, Attorney, 5420 Corporate Blvd., Suite 302, Baton Rouge, Louisiana 70808.

BATON ROUGE, Louisiana, this January 5th, 1984.

/s/ FRANZ JOSEPH BADDOCK

83-1114

Office - Supreme Court, U.S.
FILED
JAN 25 1984
ALEXANDER L. STEVAS,
CLERK

No. 1114

In the Supreme Court of the United States

OCTOBER TERM: 1983

G. HAROLD KING, JR.,

Petitioner

versus

FIDELITY NATIONAL BANK OF BATON ROUGE,

Respondent

OPPOSITION OF FIDELITY NATIONAL BANK OF BATON ROUGE TO APPLICATION OF G. HAROLD KING, JR. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID S. RUBIN
KANTROW, SPAHT, WEAVER & BLITZER
P. O. Box 2997
Baton Rouge, LA 70821-2997
Telephone (504) 383-4703

Attorneys for Fidelity National Bank of Baton Rouge

Franklin Press, Inc. Baton Rouge, La.

TABLE OF CONTENTS

Page

RESPONDENT'S REPLY TO PETITIONER'S STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED 1

A CONCISE STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

CONCLUSION 9

TABLE OF AUTHORITIES

(In order of Appearance)

Page

Garrigan v. Giese, 420 F.Supp. 68 (E. D. MO. 1976) 6

Becker v. Safelite Glass Corp., 244 F.Supp. 625 (D. Kan. 1965) 6

Sopp. v. Gehrlein, 236 F.Supp. 823 (W.D. Pa. 1964) 6

Cameron v. Vancouver Plywood Corp., 266 F.2d 535 (9th Cir. 1959) 6

11 U.S.C. 303 6

28 U.S.C. 1480(h) 7

1 *Collier on Bankruptcy* (15th Ed.) ¶3.01[4][c][iii] 7

Northern Pipeline Construction Company v. Marathon Pipeline Company, ____ U.S. ____, 102 S. Ct. 2858 (1982) 7

In Re O.P.M. Leasing Services, Inc., 9 B.C.D. 335 (S.D. N.Y. 1982) 7

Federal Rules of Civil Procedure Rule 4 8

Federal Rules of Civil Procedure Rule 45 8

Federal Rules of Appellate Procedure 45 8

28 U.S.C. 956 8

Page

United States v. Portland Cement Company, 338 F.2d 798 (10th Cir. 1974) 9

Pioche Mines Consolidated, Inc. v. Dolman, 333 F.2d 257 (9th Cir. 1964), cert. denied, 380 U.S. 956, 85 S.Ct. 1082 (13 L.Ed. 2d 972, 1965) 9

RESPONDENT'S REPLY TO PETITIONER'S STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

I.

There were two principal appeals pending in this matter before the United States Court of Appeals for the Fifth Circuit. Each appeal had a separate docket number: Case Number 82-3379 and Case Number 82-3754. On motion of Petitioner, the two cases were consolidated for purposes of oral argument. However, separate opinions were entered in both cases. The opinion in Case Number 82-3379 is reproduced at Page 19 of Petitioner's Appendix (hereafter "P.A."). The opinion in Case Number 82-3754 has not been reproduced in either Petitioner's or Respondent's Appendix (hereafter "R.A.). Both Petitioner and Respondent filed petitions for rehearing in Case Number 82-3379, both of which were denied on October 11, 1983. (R.A. p. 1a.) Only Petitioner filed a petition for rehearing in Case Number 82-3754, which was denied on September 30, 1983 (R.A. p. 2a.) Subsequently a judgment was issued by the District Court (R.A. p. 3a) and by the Bankruptcy Court (R.A. p. 5a) as to the Case Number 82-3379.

Respondent urges that the petition was filed beyond the sixty day period of Rule 20 of the Supreme Court, having been filed more than sixty days following the denial of the rehearing.

II.

The petition on its face is only the petition of G. Harold King, Jr. Therefore, this Court has no jurisdiction over the second "question presented for review" by the Petitioner, inasmuch as such "question" only relates to Shirley G. King. Shirley G. King not being a petitioner herein, this Court has no jurisdiction over the second question presented in the petition.

A CONCISE STATEMENT OF THE CASE

On July 24, 1981, Fidelity National Bank of Baton Rouge ("Respondent") filed an involuntary petition under the Bankruptcy Code against G. Harold King, Jr. and Shirley G. King. (Throughout this Brief, the term "Debtors" shall refer to both G. Harold King, Jr. and Shirley G. King. The term "Petitioner" shall refer only to G. Harold King, Jr.) The claims of the Respondent against the Debtors arise out of the various transactions described in Respondent's Motion for Summary Judgment[1] and reference is made thereto for a complete description of the transactions. At all times pertinent, each claim was fixed, liquidated, and non-contingent. As of July 24, 1981, and at all times pertinent, the Debtors were not generally paying their debts as they became due.

In response to the petition, the Debtors filed various motions. In response to the motions of the Debtors and in order to obtain more information concerning the allegations raised therein, the Respondent requested the Bankruptcy Court to

---

[1] Respondent's Motion for Summary Judgment has not been printed in Respondent's Appendix. However, a copy has been lodged with the Clerk of this Court for filing in the record.

issue a subpoena directing the Debtors to appear for a Rule 205 Examination. Despite being properly served with the subpoena, the Debtors failed to appear for the examination as ordered on advice of counsel, and did not notify Respondent of their intention not to appear until after the time scheduled for the examination. Thus, the Respondent filed a Motion for Sanctions. The Bankruptcy Court granted the Motion, assessing the Debtors' counsel with the reasonable expenses into appear for the examination without substantial justificacurred by the Respondent due to the refusal of the Debtors tion.

Following the filing of Respondent's Motion for Summary Judgment, Capital Investments, Inc. and Louisiana Equity Capital Corporation filed appropriate motions and were granted leave to intervene as petitioning creditors in this case.

On September 11, 1981, the Debtors filed an Answer and Demand for Jury Trial (P.A. p. 15). Subsequently, while Respondent's Motion for Summary Judgment was still pending, both Petitioner and Shirley G. King filed separate cross Motions for Summary Judgment. The Debtors also filed a Motion in the United States District Court for a Partial Stay "to prevent the Bankruptcy Court from hearing and disposing of a Motion for Summary Judgment filed by the Fidelity National Bank of Baton Rouge." The stay was denied by the District Court.

On November 10, 1981, the Court denied the Debtor's Motion to dismiss the petition for failure to state a claim and for lack of jurisdiction, denied the Motion of the Debtors to dismiss the interventions of Louisiana Equity Capital Cor-

poration and Capital Investments, Inc., denied the Motion of the Debtors to strike the claim of Respondent, and considered the merits of the cross Motions of the Debtors and the Respondent for Summary Judgment. The Court granted Summary Judgment in favor of Respondent. (R.A. p. 6a.)

Following the entry of judgment, the Debtors were ordered to file schedules and statements of affairs. On November 19, 1981, they applied to the District Court for an "emergency temporary stay pending appeal" of the Debtors' appeal of the various orders previously entered by the Bankruptcy Court. The request for an emergency temporary stay was denied by the District Court. Following the denial, the Debtors filed a request in the United States Court of Appeals for the Fifth Circuit for an extraordinary writ to be directed to the District Court and the Bankruptcy Court. (The request for an extraordinary writ was given Docket Number 81-3726 in the Fifth Circuit.) On December 21, 1981, the Fifth Circuit "ordered that the petition for extraordinary writ under 28 U.S.C. 1651 and Rule 21 FRAP is denied."

The Debtors appealed to the District Court, which entered an opinion affirming all decisions of the Bankruptcy Court.[2] The Debtors then appealed to the Fifth Circuit, which affirmed the judgment of the District Court except in regards to Shirley G. King (P. A. p. 19).

SUMMARY OF ARGUMENT

Petitioner has presented two questions for review. Nei-

---

[2] The District Court's opinion was extensive. The Petitioner did not include the District Court opinion in his Appendix, as is required by Rule 21.1(k) (ii). Respondent, however, has lodged a copy of the opinion with the Clerk of this Court for filing in the record.

ther are sufficiently important to warrant this Court's attention. The first question presented for review concerns the alleged denial by the courts below of Petitioner's alleged right to a jury trial. Petitioner, however, was not entitled to a jury trial due to the discretion granted to the Bankruptcy Court, and moreover due to the fact that the Petitioner waived his right to a jury trial by filing a Motion for Summary Judgment and by his failure to properly request a jury trial.

The second question presented for review concerns whether it was correct for the Bankruptcy Court to issue a subpoena for an examination of Mrs. King pursuant to Rule 205 of the Rules of Bankruptcy Procedure. Petitioner alleges that the subpoena issued to Mrs. King was improper because of the following reasons: (1) No "order of court" was obtained for the subpoena; and (2) the Fifth Circuit subsequently dismissed the involuntary proceeding against Mrs. King. As to the first matter, the distinction that the Petitioner attempts to make between a subpoena issued by a federal court clerk under seal of the court and a formal "order of court" is ill-founded and incorrect. As to the second matter, obviously Mrs. King was a party to this proceeding until the Fifth Circuit ruled on September 30, 1983. The issuance of the subpoena in 1981 at a time when Mrs. King was a party was clearly appropriate under the circumstances. Finally, the Petitioner in this case is G. Harold King, Jr., not Shirley G. King. Therefore, this Court has no jurisdiction over the second question presented for review, inasmuch as Petitioner G. Harold King, Jr. has no justiciable interest therein.

On both these issues, there is great unanimity of opinion and an unbroken line of authority. The courts below merely

followed long-held doctrines that have successfully stood the test of time.

ARGUMENT

Petitioner alleges that he was denied his right to a trial by jury. However, the Petitioner filed his own Motion for Summary Judgment in response to Respondent's Motion for Summary Judgment. Summary judgment is in effect trial on the merits. *Garrigan v. Giese*; *Becker v. Safelite Glass Corp.*; *Sopp v. Gehrlein*. Respondent's Motion for Summary Judgment was amply supported by the pleadings and affidavits filed in the record, as found by the District Court and the Fifth Circuit. The Petitioner did not see fit or was unable to contest the factual allegations of the affidavits filed in the record. The Bankruptcy Court was faced with opposing motions for summary judgment — it ruled based on the evidence before it. The citations in Petitioner's brief to cases such as *Cameron v. Vancouver Plywood Corp.* are inapposite, because having filed his own motion, Petitioner subjected himself to having the doubts as to the existence of a genuine issue of material fact resolved against him as mover as well as to a trial without a jury. As both courts below found, the so-called "issues of fact" raised by Petitioner were not issues that were capable of consideration by the Bankruptcy Court in determining the propriety of the entry of an order for relief under 11 U.S.C. 303.

Even assuming, arguendo, that Petitioner was nevertheless entitled to a jury trial despite waiver thereof by filing his own Motion for Summary Judgment, the Petitioner additionally waived his right for a jury trial by not making a proper and timely jury demand. As pointed out in the District

Court opinion on page 6, ". . . the request [for a jury trial] was not properly made, since the debtors requested a jury trial in the **district court** before the district judge, but the request was directed to the bankruptcy judge, who has no authority over the district court. Any right which the [Debtors] might have had, if any, was therefore waived by not making a proper and timely jury demand."

Moreover, the right to a trial by jury, at least as of September 24, 1981, the date of the denial by the Bankruptcy Court of Petitioner's Request for Jury Trial, was discretionary with the Bankruptcy Court. 28 U.S.C. 1480(b); 1 *Collier on Bankruptcy* (15th Ed.) ¶3.01[4][c][iii].

Petitioner relies to a great extent on *Northern Pipeline Construction Company v. Marathon Pipeline Company* for the proposition that 28 U.S.C. 1480 is unconstitutional. However, the sole holding of *Marathon* is that "the broad grant of jurisdiction to the Bankruptcy Court contained in Section 241(a) [of the Bankruptcy Code, 28 U.S.C. 1471 et. seq.] is unconstitutional." 102 S.Ct. at 2880. Moreover, this Court stayed the effect of *Marathon* until October 4, 1982. The denial of Petitioner's request for a jury trial was made on September 24, 1981, and the Motion for Summary Judgment in favor of Respondent was granted on November 11, 1981. *Marathon* applies prospectively only, and thus has no effect on the disposition by the Bankruptcy Court in 1981. See *In Re O. P. M. Leasing Services, Inc.*

Petitioner's "second question presented for review" concerns various allegations regarding Rule 205 of the Rules of Bankruptcy Procedure, but **only** insofar as Mrs. King. Mrs. King has not applied for a writ of certiorari and is therefore

not a petitioner herein. The Petitioner herein, Mr. King, has no justiciable interest in the matters relating to the examination of Mrs. King. Should Mrs. King have desired to raise such issues, she should have properly filed a petition in this Court within the applicable time provided by law.

Despite Respondent's contention that Petitioner has no justiciable interest in regards to matters affecting Mrs. King, Respondent nevertheless will address the issue raised by Petitioner in regard to Rule 205. Petitioner attempts to differentiate between an "order of court" and a subpoena issued by the clerk of a federal court under seal of the court, but cites no ground or authority for such a distinction. Such a distinction is ill-founded and incorrect. It is well-settled and no citation of authority need be given that the clerk of a federal court may properly issue orders under the seal of the court where provided by law. (See e.g., FRCP 4, 45; FRAP 45; 28 U.S.C. 956. In fact, FRCP 45(a) provides that "every subpoena shall be issued by the **Clerk** under the seal of the court . . ." [Emphasis added.]) As stated by the Fifth Circuit in its opinion below,

> "The Kings' defense against the sanctions is based in part on the theory that a subpoena is not a court order. [Footnote: They do not actually argue that a subpoena is not a court order for purposes of Rule 37, but rather that it is not a court order for purposes of Bankruptcy Rule 205(a) . . . the argument is equally specious in both contexts]. Not surprisingly, they cite no authority for this novel proposition. [Footnote omitted] Even if a subpoena were not a court order (which is not the case), the sanction here would still have been available under Rule 37(d)."

The District Court opinion (page 3) similarly found no dis-

tinction beween an order of the court and a subpoena issued by the clerk of court under seal of the court.

Petitioner also objects to the $250.00 fine levied against his attorney for directing his clients not to appear at the examination. It must be noted that Petitioner's counsel was an appellant in the Fifth Circuit (R.A. p. 4a), inasmuch as the fine was levied against the attorney personally. Petitioner's counsel has not applied to this Court for relief from the fine. Petitioner has no right to appeal the fine that was levied against his counsel where his counsel appeared as an appellant in the courts below. Even if Petitioner has the right to raise this issue, as pointed out by the Fifth Circuit, the argument of Petitioner is flawed. Petitioner's attempt to distinguish the cases of *United States v. Portland Cement Company* and *Pioche Mines Consolidated, Inc. v. Dolman* is without merit. The fact that these cases dealt with a deposition as opposed to a Rule 205 examination is a distinction without a difference. Those cases clearly held that a motion to quash must be not only made but granted before the scheduled examination in order to excuse compliance. See also Footnote 8 to the opinion of the Fifth Circuit.

CONCLUSION

The issues raised by Petitioner have been adjudicated by three separate courts in a total of in excess of fifteen separate appeals. Pretermitting the right of Petitioner to raise the "second question presented for review," the questions presented to this Court do not meet the standards of Rule 17 of the Rules of the Supreme Court as to the considerations governing review on certiorari. The results in this case were not unfair to

Petitioner. Finally, for reasons fully addressed by the courts below, Petitioner's legal arguments are flawed and groundless.

For the reasons stated, this Court should deny the petition for Writ of Certiorari.

By Attorneys,

KANTROW, SPAHT, WEAVER & BLITZER
P. O. Box 2997
Baton Rouge, LA 70821-2997
Telephone (504) 383-4703

/s/ David S. Rubin

CERTIFICATE OF SERVICE

I certify under Rule 28.5 of the Rules of the Supreme Court that I have this date, by prepaid mail, forwarded three (3) copies of the foregoing Opposition and Appendix to Mr. Franz Joseph Baddock, P. O. Box 3573, Baton Rouge, LA 70821. I have further forwarded one (1) copy of the foregoing Opposition and Appendix to Mr. Frederick R. Tully, P. O. Box 2471, Baton Rouge, LA 70821; Mr. Charles N. Malone, P. O. Box 3233, Baton Rouge, LA 70821; and Mr. Michael T. Perry, 5420 Corporate Boulevard, Suite 302, Baton Rouge, LA 70808.

Baton Rouge, Louisiana, this _____ day of January, 1984.

/s/ David S. Rubin

83-1114

FILED
JAN 25 1984
ALEXANDER L. STEVAS,
CLERK

No. 1114

In the Supreme Court of the United States

OCTOBER TERM: 1983

G. HAROLD KING, JR., APPELLANT
Petitioner

versus

FIDELITY NATIONAL BANK
OF BATON ROUGE
Respondent

OPPOSITION OF FIDELITY NATIONAL BANK OF BATON ROUGE TO APPLICATION OF G. HAROLD KING, JR. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX OF FIDELITY NATIONAL BANK OF BATON ROUGE

DAVID S. RUBIN
KANTROW, SPAHT, WEAVER & BLITZER
P. O. Box 2997
Baton Rouge, LA 70821-2997
Telephone (504) 383-4703
Attorneys for Fidelity National Bank of Baton Rouge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3379

G. HAROLD KING, JR. and
SHIRLEY G. KING,

Plaintiffs-Appellants,

versus

FIDELITY NATIONAL BANK OF BATON ROUGE,
CAPITAL INVESTMENT INC. and LOUISIANA
EQUITY CAPITAL CO.,

Defendants-Appellees.

Appeal from the United States District Court for the
Middle District of Louisiana

ON PETITIONS FOR REHEARING
(October 11, 1983)

Before GARZA, RANDALL and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

/s/ CAROLYN DINEEN RANDALL
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 82-3754

G. HAROLD KING, JR., and
SHIRLEY G. KING,

Plaintiffs-Appellants,

versus

FIDELITY NATIONAL BANK
OF BATON ROUGE,

Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Louisiana

ON PETITION FOR REHEARING
(September 30, 1983)

Before GARZA, RANDALL and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ CAROLYN DINEEN RANDALL
United States Circuit Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

G. HAROLD KING, JR.,	:	CA 81-851-A, 81-852 &
ET AL.	:	853-A, 81-929-A & 81-
VS.	:	1037-A
FIDELITY NATIONAL	:	Bankruptcy Court Docket
BANK OF BATON ROUGE,	:	
ET AL.	:	Number 81-00329

JUDGMENT

In accordance with the mandate of the United States Court of Appeals for the Fifth Circuit issued October 21, 1983 in Docket Number 82-3379 of that Court:

IT IS ORDERED that this matter be remanded to the United States Bankruptcy Court for the Middle District of Louisiana, and that Court is ordered and directed to vacate the order for relief against Shirley King and dismiss the petition against her.

Baton Rouge, Louisiana, November 10, 1983.

/s/ JOHN V. PARKER
Chief Judge
Middle District of Louisiana

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

IN RE:	:	CIVIL ACTION NO. 81-
G. HAROLD KING, JR.,	:	851-A, 81-852-A, 81-853-
AND SHIRLEY G. KING	:	-A, 81-929-A, 81-1037-A

NOTICE OF APPEAL

Notice is hereby given that FRANZ JOSEPH BADDOCK, G. HAROLD KING, JR., and SHIRLEY G. KING, defendants, hereby appeal to the UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT from the Findings and Reasons entered and filed herein on May 19, 1982, and the Final Judgment thereon entered and filed herein on May 20, 1982.

BATON ROUGE, Louisiana
June 14, 1982

/s/ FRANZ JOSEPH BADDOCK,
in behalf of himself and as
Attorney for G. HAROLD
KING, JR. and SHIRLEY G.
KING.
Appellants
Post Office Box 3573
Baton Rouge, Louisiana 70821
(Tel.: (504) 343-9194)

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA

IN RE:	:	
G. HAROLD KING, JR. AND	:	
SHIRLEY G. KING	:	DOCKET NUMBER
	:	81-00329

JUDGMENT

In accordance with the Judgment of the United States District Court for the Middle District of Louisiana, dated November 10, 1983, in the cause entitled "G. HAROLD KING, JR., ET AL. v. FIDELITY NATIONAL BANK OF BATON ROUGE, ET AL., and in Docket Numbers CA 81-851-A, 81-852 & 853-A, 81-929-A & 81-1037-A of that Court:

IT IS ORDERED, ADJUDGED, AND DECREED that the order for relief entered against Shirley G. King by Judgment of this Court dated November 10, 1981, is herewith vacated, and the petition filed against her by the Fidelity National Bank of Baton Rouge on July 24, 1981, as well as the intervening petitions filed against her by Capital Investments, Inc. and Louisiana Equity Capital Corporation on August 28, 1981, are herewith dismissed.

BATON ROUGE, Louisiana, November 15, 1983.

/s/ WESLEY W. STEEN
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA

IN RE:	:	DOCKET NUMBER-
	:	81-00329
	:	
G. HAROLD KING AND	:	
SHIRLEY G. KING	:	

JUDGMENT

This matter came for hearing on November 10, 1981. Present in Court: David S. Rubin, Attorney for Fidelity National Bank of Baton Rouge; Franz Joseph Baddock, Attorney for G. Harold King, Jr. and Shirley G. King; and Louis Phillips, Attorney for Louisiana Equity Capital Corporation and Capital Investments, Inc.

CONSIDERING the pleadings filed in this matter, the depositions and affidavits filed in this matter, and the presentations of counsel, after hearing the evidence, considering the law and evidence to be in favor thereof.

IT IS HEREBY ORDERED that the Motion of Debtors to Dismiss the Petition for Failure to State a Claim and for Lack of Jurisdiction is denied; and

IT IS FURTHER ORDERED that the Motion to Dismiss the Interventions of Louisiana Equity Capital Corporation and Capital Investments, Inc. is denied; and

IT IS FURTHER ORDERED that the Motion of Debtors to Strike the Claim of Fidelity National Bank of Baton Rouge is denied; and

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by the Debtors is denied; and

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by Fidelity National Bank of Baton Rouge is hereby granted, and an Order for Relief is hereby entered.

JUDGMENT RENDERED at Baton Rouge, Louisiana, this 10th day of November, 1981.

JUDGMENT SIGNED at Baton Rouge, Louisiana, this 10th day of November, 1981.

/s/ A. LEON HEBERT
United States Bankruptcy Judge

1 Collier on Bankruptcy (15th ed.) ¶ 3.01[4][c][iii]

[iii]—Jury Trials in Involuntary Cases. 28 U.S.C. § 1480(b).

Section 1480(b) provides that:

"The bankruptcy court may order the issues arising under section 303 of title 11 to be tried without a jury."

• • •

With this interpretation of section 1480(b) kept in mind, the mandate of the section is clear: the bankruptcy judge is to have complete discretion in determining whether or not these issues are to be tried by a jury. Although as an initial matter, the debtor is entitled to a jury on these issues under the general rule of section 1480(a), the judge, apparently *sua sponte* or upon the motion of the petitioning creditors, may direct that a jury trial not be held. At least this much of the statute is open to no other interpretation.

28 U.S.C. § 956. Powers and duties of clerks and deputies

The clerk of each court and his deputies and assistants shall exercise the powers and perform the duties assigned to them by the court.